IN THE

Supreme Court of the United States

October Term, 1945

No. 391

LEWIS E. NASH,
Petitioner

vs.

PETER RAUN,
Respondent

REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

FRANKLIN B. HOSBACH,
HOSBACH, GOOD & FISCHER,
604 Palace Hardware Bldg.,
Erie, Pennsylvania,

THOMAS D. CALDWELL,
CALDWELL, FOX & STONER,
23 South Third Street,
Harrisburg, Pennsylvania,
Counsel for Respondent.

Murrelle Printing Company, Law Printers, 201-203 Lockhart St., Sayre, Pa.
Leon F. Miller, Dauphin County Representative, Harrisburg, Pa.

TABLE OF CONTENTS

TABLE OF CASES CITED

COUNTER-STATEMENT OF THE CASE

This is a civil action for damages by reason of an automobile accident which occurred October 9, 1941, in Erie County, Pennsylvania, at the right angle intersection of Route 89, a through highway, and an intersecting road known as Station Road (85a). Route 89 runs north and south, Station Road east and west (75a).

The petitioner was driving an automobile westwardly on Station Road toward the city of Erie (41a) and the respondent was driving his truck northwardly on Route 89, a through highway (112a). The intersection was controlled by a stop sign on Station Road, *facing* the oncoming *petitioner* (85a).

The petitioner offered no eyewitness testimony as to the happening of the accident, claiming he had, by reason of injuries to his head, lost all recollection of what had happened after he passed a point approximately three-quarters of a mile removed from the intersection (44a, 45a).

The vision which the two drivers had of each other approaching from the directions indicated was rather badly obscured by a row of six trees as well as by a bank approximately three to four feet high, at the southeast corner of the intersection (75a, 76a). Petitioner failed to prove by any testimony that he *had stopped at the stop sign before proceeding into the intersection. Petitioner based his case entirely upon circumstantial evidence.*

Counter-Statement of the Case

The circumstantial evidence was substantially as follows:

Lloyd Jones who lived three hundred to three hundred and fifty feet south of the intersection, heard the sound of the collision and upon reaching the scene saw the automobile in the ditch northwest of the intersection, standing on its four wheels facing south, its engine running and its left side crushed in and the door on the right side open (9a-13a). The petitioner was in the ditch back of the car unconscious (13a). The truck was lying on the west side of Route 89 about 12 feet north of the back end of the Nash car (15a). Some milk cans were scattered in the ditch and there were tire marks on Route 89 on the right hand side approaching the intersection (17a), but they did not lead to the truck and were not identified as having been made by it. There were also skid marks running from approximately the center of the intersection towards the Nash car. These were broad "wavery" lines and not distinct (19a, 20a). Jones testified it was foggy and that the front end of the truck was damaged and the axle bent four inches out of line (16a). This testimony was corroborated by Robert Russel Jones and Margaret S. Jones. .

This was the petitioner's case and the counsel for the respondent moved for a directed verdict which motion was overruled.

For the respondent, Peter Raun himself testified that he looked both ways approaching the intersection and saw nothing, but when within six or eight feet of it, a car flashed in front of him from the east, resulting in the collision (113a). He testified that this car, driven by the petitioner,

Nash, was going at least fifty miles per hour (113a) and did not stop at the "STOP" sign.

Arthur D. Scholton, a witness for the respondent, had followed the petitioner from a point one-half to three miles east of the intersection and he testified that the petitioner passed him at a speed of at least fifty miles per hour and that he *never slowed down* for the *"STOP" sign* at the intersection (128a, 129a).

Raun and Scholton were the only eye witnesses to the happening of the collision and the events immediately preceding.

At the conclusion of all the testimony in the case the respondent once again renewed his motion for a directed verdict and also presented a point for binding instructions, both of which were denied. The court stated it was a close case (66a).

The jury then brought in a verdict in favor of the petitioner in the amount of $13,500.

Subsequently the respondent filed a motion for a new trial and a motion for judgment n. o. v. These motions were subsequently overruled and judgment entered on the verdict. From this judgment the respondent took an appeal to the Circuit Court of Appeals for the third circuit, which court reversed the judgment of the trial court and directed the entry of judgment for the respondent. Later the petitioner filed a petition for reargument which was overruled by the Circuit Court of Appeals. After a mandate was issued to the District Court the petitioner filed his petition for a writ of certiorari in this court.

ARGUMENT

POINT A

The petitioner alleges that he was denied the right of trial by jury, entitled to him by the Seventh Amendment of the United States Constitution. Such a position is untenable and can best be answered by quoting what the Supreme Court said in the case of *Galloway vs. United States* reported in 319 U. S. 372. In that case the court held:

> "If the intention is to claim generally that the [7th] Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure.
>
> Furthermore, the argument from history is not convincing. * * * (389)
>
> * * * The more logical conclusion we think, and the one which both history and the previous decisions here support is that *the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements*, not the great mass of pro-

cedural forms and details varying even then so widely among common-law jurisdictions. * * * (392)

Finally, the objection appears to be directed generally at the standards of proof judges have required for submission of evidence to the jury. But standards, contrary to the objection's assumption, cannot be framed wholesale for the great variety of situations in respect to which the question arises. * * * Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. * * *'' (Italics added)

In support of his contention on this point the petitioner has cited several Supreme Court cases which we might examine briefly. In the case of *Tennant vs. Peoria & Pekin Union Railway Company*, 321 U. S. 29, the action arose under the Federal Employers Liability Act. Tennant was killed by a backing train and the evidence was undisputed that one of the rules of the company was, that before backing a signal had to be given. It was admitted, no signal was given in this instance. Certainly this was evidence for the jury. Moreover, in that case, the Circuit Court, instead of taking the evidence in the case, speculated as to how, in its opinion, the accident might have happened.

The case of *Bailey vs. Central Vermont Railway, Inc.*, 319 U. S. 350, also arose under the Federal Employers Liability Act. The question involved was whether or not the defendant had furnished his employees a safe place to work. The evidence was, that there was only twelve (12) inches of footing at the side of the car and eight (8) or nine

(9) inches of this was taken up by timber. The Supreme Court held that this was a case for the jury.

The case of *Jacob vs. City of New York*, 315 U. S. 752, involved an action brought under the Jones Act. Under the provisions of this act, the employer of seamen is liable for defect in its appliances and other equipment. The plaintiff, in his duties had to use a wrench which was badly worn. On three occasions he asked for a new wrench but none was given him. The trial court refused to allow the case to go to the jury on the "Simple Tool Doctrine". The Supreme Court reversed, stating that it was for the jury to decide whether the plaintiff used a reasonable safe and suitable tool and whether the defendants failure to supply a new wrench did not amount to negligence and whether, further, that the "Simple Tool Doctrine" under these facts did apply.

Lyon vs. Mutual Benefit Health and Accident Association, 305 U. S. 484, arose from a claim by beneficiary on a health and accident policy. The State in which the case was tried, had a rule similar to the Federal Rule and after the plaintiff presented her evidence, the defendant moved for peremptory instructions and offered no evidence. This was refused and the verdict rendered for the plaintiff. The Court of Appeals of Arkansas reversed on the grounds that the oral evidence of payment was incompetent because it represented an effort to alter the terms of a written contract. The Supreme Court held that the evidence was not an attempt to alter a written contract but merely show that the premium was paid in advance and that the policy was in full force and effect at the time of the decedent's death and it further held that the case had proceeded on

the belief that a question of law was involved and that neither party indicated the desire to have the jury pass on any facts. The Supreme Court held also that this procedure rule did not amount to a prohibited invasion of rights.

We are unable to see what bearing any of the above cases have on the case now before the court. In those cases cited above, wherein the Supreme Court held that a jury trial should have been granted, there was without exception sufficient evidence for the plaintiff to warrant submission of the issues to a jury.

In the present case, not one eye-witness was called by the plaintiff and the petitioner's argument, as to evidence is based on an allegation that Mrs. Margaret Jones stated that the fog was so dense that she could see only five (5) or six (6) feet. However, *she was not an eye-witness* and did not arrive at the scene until some time after the accident. Mrs. Jones testified that after the crash she turned off her stove, was ready to leave the house and then went back to place a long distance phone call for an ambulance so that she did not actually leave for the scene until some time less than fifteen (15) minutes after the collision (33a to 35a).

Not only did the petitioner emphasize this evidence on his appeal to the Circuit Court of Appeals but he dwelt at great length on it in his petition for rehearing before that court, so that the matter was passed on not once but twice by the Circuit Court of Appeals.

Mrs. Jones' son, Robert, was eating when he heard the crash. He left at once for the scene of the accident, which was approximately 300 to 350 feet away. He arrived at the

scene in such period of time after the crash as it would have taken to travel this distance. He testified that the visibility was 50 to 100 feet (25a). The defendant testified that the sun was shining at the time of the accident (110a-111a), and the only other eye-witness, Scholton, testified that the weather conditions were such that at the time of the accident one could have driven up to the legal speed limit (130a). The court will take judicial notice of the fact that fog may roll in and out of a given locality in a very short period of time and we contend, therefore, that the fact that an intersection was foggy sometime after an accident is no evidence as to condition at a prior time.

Argument

POINTS B AND C

The petitioner in his petition for rehearing, in the Circuit Court of Appeals, contended that the respondent had failed to comply with rule 50 of the Federal Rules of Civil Procedure. At that time we felt that the petitioner was honestly mistaken and had overlooked the record in the case and in our answer to the petition for rehearing, we pointed out in detail how the respondent had complied with the requirements of this rule. The petitioner again urges this position on the Supreme Court and we must now believe that he is deliberately attempting to mislead the Court in stating that the respondent failed to comply with this rule. In answer to these points the Court's attention is directed to Page 61a of the record. A reading of Pages 61a to 63a, reveals that a motion for a directed verdict was made and five reasons were assigned for the motion. Discussion on the motion continued through Pages 63a to 66a.

Furthermore, there is nothing in this discussion to show that the respondent withdrew his motion, but at all times he insisted upon the granting of the same.

On Page 65a, the District Court raised the question as to whether the respondent could proceed with his counterclaim if the motion prevailed. The discussion on that point ended and there was no indication whatsoever of the respondents intention to withdraw this motion for a directed verdict. The motion was renewed at Page 74a and also was brought to the court's attention again by an exception at Page 79a.

On October 8th, 1943, after judgment had been entered

against the respondent, he filed a written notice asking that judgment be entered in accordance with his previous motion for a directed verdict. In doing so the respondent complied with rule 50(b), which states:

> "Within 10 days after the reception of a verdict a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside, and to have judgment entered in accordance with his motion for a directed verdict."

This the respondent did, using the exact language of the rule in making his motion. We have shown that several grounds were set forth in the motion for a directed verdict as required by rule 50(a).

It might further be stated that it is unnecessary to file reasons in support of a motion for judgment notwithstanding the verdict because that situation is governed by rule 50(b).

These points were urged at great length in the petitioner's request for rehearing before the Circuit Court of Appeals.

As was pointed out by the Supreme Court, in *Berry vs. United States of America*, 312 U. S. 450, it has never been decided definitely whether it is even necessary to move to have a judgment entered upon a verdict set aside.

We have referred to the opinion of the Supreme Court in the Galloway case cited by the petitioner under Point A.

POINT D

We have no dispute with the cases set forth under Point D, in the petition, in fact, the Circuit Court of Appeals quoted the cases on which the petitioner relies in its opinion, ordering judgment for the defendant. The court said:

> "Plaintiff argues that the evidence shows that defendant was traveling at an excessive rate of speed and failed to have his car under proper control. He relies on the principle that the driver of a motor vehicle is required to keep his car at a speed and under such control that he can stop within the distance he can see ahead, Janeqay v. Lafferety Bros., 323 Pa. 324, 185 Atl. 827, which may be reduced by atmospheric conditions or other visual obstructions. Simrell v. Schmerin, 316 Pa. 323, 175 Atl. 516. While the testimony showed that defendant's vision ahead was limited by the fog to 'from 50 to 100 feet', the skid marks on Route 89 extended for only thirty feet before reaching the center line of the intersection. If the defendant could have stopped his truck within the distance he could clearly see ahead, i. e., fifty to one hundred feet, it cannot be said that he was driving at a negligently excessive rate of speed, there being no other variable factors present. The law does not require that the speed be such that a driver can avoid hitting an object that suddenly appears a short distance before him. To do so would impose too great a burden upon the driving public. If the obstacle is for the first time within the driver's view, after the driver has passed the point of

> assured clear distance ahead, the measuring point having been reached and passed, then the defendant cannot be said to be driving at a negligent speed and without his vehicle under proper control merely because he cannot now avoid a collision. Stark v. Fullerton Trucking Co., 318 Pa. 541, 179 Atl. 84. At best, the evidence indicated that plaintiff's car first came into view after the defendant had passed the measuring point (50 to 100 feet before the intersection)." (197 and 198). 149 F. (2d) 887, 888.

We can add little to what the court said above, except to reiterate that there was no evidence that visibility *at the time of the collision* was reduced to between 5 and 6 feet, but we would like to emphasize that at the time of the accident, the respondent was on a properly marked through highway and that the petitioner was on an intersecting highway, and it was the respondent's duty to stop to permit traffic on the through highway to pass.

POINT E

There is no doubt that the law in Pennsylvania, in such situations as this is, "all the evidence and inferences therefrom favorable to the plaintiff must be taken as true and all unfavorable to them, if dependent solely on testimony must be rejected." The Circuit Court applied this very rule of law in the present case. It will be remembered that the respondent testified that the sun was shining at the time of the accident (111a) and he was corroborated by Scholton (130a). The Circuit Court of Appeals disregarded entirely this testimony of the respondent and accepted the testimony of the petitioner that the visibility was from 50 to 100 feet. Since the petitioner seems to base almost his entire argument on the question of visibility, we might examine this point in some detail. Lloyd Jones, the husband of Mrs. Margaret Jones, lived between 300 and 350 feet from the scene of the accident (10a). Upon hearing the crash he left the house through the door nearest the intersection and walked to the intersection to see what had taken place (11a). He stated that he looked at the position of the cars (11a), that he saw Mr. Nash lying on the ground, examined him and placed him in a horizontal position (15a). He looked around the vicinity for Mr. Raun. Robert Jones, the son of Margaret and Lloyd Jones accompanied his father to the scene of the crash and he examined the Nash car (23a), helped move Nash, attempted to stop the motor in the Nash car, climbed into the truck and looked around for Raun. He testified that when he reached the intersection, *the visibility was from* 50 *to* 100 *feet* (25a). Mrs. Margaret Jones, on whose testimony the petitioner bases

his entire argument stated that she heard the collision, then went back to her kitchen, regulated the stove before she started to go out (26a). She further admitted that she did not leave the house immediately, although it was less than fifteen minutes after the collision, but before she got away from the house, her son, Robert, came back and called to her from the driveway, asking her to call an ambulance and that she placed an out of town call for the ambulance (35a). She waited until the call was completed. After doing all this Mrs. Jones went to the scene of the accident and testified that the visibility was 5 or 6 feet (36a). It will be seen from the above, that the Circuit Court took the testimony of the petitioner as to the visibility and disregarded entirely the testimony of the respondent.

We do not see how a jury could have been permitted to consider the testimony of Mrs. Jones as to fog and visibility when she reached the intersection some fifteen minutes later as bearing upon the visibility when the collision occurred.

The petitioner has referred to the case of Scalet vs. Bell Telephone Company of Pennsylvania, 291 Pa. 451. We can see no relationship between that case and the present situation. There, the defendant asked that the judgment be reversed on the grounds that the testimony was opposed to incontrovertible visible facts. There is no such situation in our case.

Argument

POINT G

The petitioner has gone to great length to attack the testimony of Arthur Scholton. On reading his testimony, one may reach the conclusion that he is not over-intelligent, but that does not impeach his credibility. It might be interesting to note that in the petitioner's motion for rehearing, in the Circuit Court of Appeals, he referred to some of Scholton's testimony in support of his motion (207). However, the question of the credibility of the witness is not before the court in these proceedings, the only question being, whether or not the Circuit Court of Appeals erred in finding that there was no evidence to support the verdict.

The petitioner has referred to a portion of the opinion of the trial judge, wherein he summarizes certain circumstantial evidence and which he contended justified the verdict. We fear that the trial judge, here, speculated on what might have happened. This is the very situation condemned by the Supreme Court in the case of *Tennant vs. Peoria & Pekin Union Railway Company*, 321 U. S. 29. It has been held:

> "Circumstantial evidence to sustain a verdict must be so strong as to preclude the possibility of injury in any other way, and provide as the only reasonable inference the conclusion for which the contention is made * * *" (Italics ours)
>
> *Pfendler v. Speer, Appellant*, 323 Pa. 443, 448, 185 A. 611;

See also *Skrutski v. Cochran, et al.*, 341 Pa. 289, 19 A. (2d) 106;

Kelly v. Phila. Transportation Co., 146 Pa. Superior 445, 23 A. (2d) 57.

With regard to the position of the automobiles and other objects after the accident, such evidence is of very little value and certainly insufficient to establish negligence. As has been said:

> "*Automobile accidents and collisions are attended by strange, unexpected and apparently incredible results which seem to defy the commonly known laws of physics and their effects. Without data on the phenomena of automobile collisions, without text-books of experience or scientific experiment, without an accepted standard, without even accurate information of the weights and speeds of the instant vehicles and the angle of the blow, this court has no basis which would justify it in taking judicial notice that plaintiff's car could not have been thrown into its position by the impact,* if it were standing still when struck, when it is hardly less mysterious how it got into that position at all.
>
> The courts are properly slow to take judicial notice of the phenomena attending colliding forces because as was said in Basting v. Brooklyn Heights R. Co., 39 App. Div. 629, 57 N. Y. S. 119, 120: '*The study of accidents shows strange and inscrutable results, sometimes stranger than fiction;*' and in Spiro v. St. Louis Transit Co., 102 Mo. App. 250, 76 S. W. 684, 688: '*Freakish effects are sometimes caused by violent impacts of moving bodies;*' and in Lang v. Missouri

Pacific R. Co., 115 Mo. App. 489, 497, 91 S. W. 1012, 1013: '*So frequently do unlooked for results attend the meeting of interacting forces that courts, in such cases, should not indulge in arbitrary deductions from physical law and fact, except when they appear to be so clear and irrefutable* that no room is left for the entertainment, by reasonable minds, of any other'." (Italics ours)

Prove v. Interstate Stages, Inc. et al. (Mich.), 231 N. W. 41, 44.

"*Perhaps a physicist, if he knew with certainty the angles at which two automobiles were being projected at the moment they collided and knew their respective weights, the resistance power of the material of which they were constructed, respectively, and the positions and distances from the point of collision, could determine accurately the rate at which each automobile was going when they collided.*" (Italics ours)

Meeker v. Teer, 122 S. W. (2d) 338, 339 (Tex.).

"*So many facts enter into the movements of cars after accidents that it cannot be laid down as a general rule that the position of a car after an accident necessarily proves anything* with respect to its position before the accident, nor does the location of the damage to each of the cars in a collision necessarily prove anything about the location where the collision took place. In some cases the physical evidence might be persuasive, and in other cases, the physical evidence might be capable of many different interpretations. State v. Hopkins, 173 Md. 321, 196 A. 91 (5, 6). In a case like

that before us where there is nothing but physical evidence, great care should be taken not to permit the jury to speculate on possible causes of which there is no tangible proof." (Italics ours)

Gloyd v. Wills, (Md.) 23 Atl. (2d) S. 665.

This circumstantial evidence, mentioned by the trial judge, was brought at great length to the attention of the Circuit Court of Appeals. There can be no doubt that the Circuit Court considered the matter, for it said in its opinion:

"The position of the two vehicles after the accident was also strongly relied upon by the plaintiff as proof of defendant's negligence. Plaintiff contended that the position in which the defendant's truck rested at a point approximately fifty feet north of the intersection indicated a negligently excessive rate of speed. The defendant contended that the 'top-heavy' truck swung in a wide arc after the sudden stop and that centrifugal force turned the truck around and threw it up the road. Either theory is logical. Only a skilled physicist by using complicated formulae might explain what actually did happen. Evidence which tends to support two conflicting hypotheses tends to support neither and the circumstantial evidence, as presented, leaves the question of the defendant's speed in a conjectural vacuum.

The other circumstances relied on by the plaintiff, —the noise of the collision, the position in which the plaintiff was found, the scattered milk cans—are all indicative of the great force of the collision. But plaintiff failed to establish that the force with which

the defendant struck the plaintiff was such that the defendant could not have stopped his truck within the "fifty to one hundred feet" which the law allowed him under the circumstances. Although the evidence might support a finding that defendant could not stop his truck within thirty feet—the length of the skid marks—there is no substantial proof whether he could have stopped within fifty to one hundred feet. Without this proof plaintiff has not proved negligence. Although it is not necessary to prove negligence by direct evidence, the plaintiff must at least establish circumstances from which negligence may be inferred. Ranck v. Sauder, 327 Pa. 177, 193 Atl. 269; Delmer v. Pittsburgh Railways Co., 348 Pa. 147, 34 A. (2d) 502; Madden v. Lehigh Valley R. Co., 236 Pa. 104. The duty rests upon the plaintiff to so picture the facts upon which he bases the liability of the defendant as to enable the jury to visualize the occurrence and form an independent judgment thereon. Mack v. United States Gypsum Co., 288 Pa. 9, 135 Atl. 623; Lithgow v. Lithgow, 334 Pa. 262, 5 A. (2d) 573. The mere fact that there was an accident and that the plaintiff was not himself negligent does not, per se, mean that the defendant must have been negligent. Sajatovich v. Traction Bus Co., 314 Pa. 569, 172 Atl. 148; McAvoy v. Kromer, 277 Pa. 196, 120 Atl. 762; Flanigan v. McLean, 267 Pa. 553, 110 Atl. 370; Erbe v. Philadelphia Rapid Transit Co., 256 Pa. 567, 100 Atl. 966. The circumstantial evidence presented in the present case is as consistent with the theory that the defendant was not negligent as it is with the theory he was. If the plaintiff cannot show the possibility of a conclusion of defendant's negligence supported by a clear preponder-

> ance of its likelihood, Ott v. Boggs, 219 Pa. 614, and excluding other probabilities just as reasonable, Alexander v. Pennsylvania Water Co., 201 Pa. 252, the plaintiff should not be permitted to go to the jury. The circumstances must compel the conclusion that the defendant was negligent. Pflendler v. Speer, 323 Pa. 443, 185 Atl. 618. The jury may not be allowed to guess." (197 and 199) (149 F. (2d) 887, 888)

We respectfully submit that there is no merit whatever in the petition. This was a case tried without eyewitnesses for the petitioner. The petitioner was under a heavy disability because he was coming out of a road controlled by a stop sign into a through highway which the respondent was traveling. Without proving by evidence that he stopped at the stop sign, he attempted to base his case upon an alleged lapse of memory and on the position of the cars after the accident. Upon analysis the position of the objects after the accident as well as the question of poor visibility, proved to be wholly inadequate to establish negligence on the part of the respondent. The trial court recognized that it was a close case on the question of giving binding instructions and so stated in the record.

The Circuit Court of Appeals heard a full and complete argument and decided that there was insufficient evidence. In a petition for rehearing the petitioner again advanced every possible argument to the Circuit Court of Appeals. This was refused after careful consideration. There is no real constitutional question whatever in the case and this petition for a writ of certiorari merely represents another attempt to have the facts considered once again. As to the proposition that the petitioner has been

denied a trial by jury we confidently rest our case upon Galloway vs. United States, 319 U. S. 372, supra.

Wherefore we respectfully urge that the petition be denied.

Respectfully submitted,

FRANKLIN B. HOSBACH,
HOSBACH, GOOD & FISHER,
THOMAS D. CALDWELL,
CALDWELL, FOX & STONER.